Supreme Court, U.S.
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No. 99-1235

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. — ALABAMA
and GREEN TREE FINANCIAL CORPORATION,

Petitioners,

v.

LARKETTA RANDOLPH,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the court of appeals properly held that a district court's order compelling arbitration and dismissing with prejudice the entirety of the underlying individual and class claims constitutes a "final decision" that is subject to immediate review under the Federal Arbitration Act, 9 U.S.C. § 16(a)(3).

2. Whether the court of appeals properly held unenforceable an arbitration clause which failed to provide the plaintiff protection from the risk of bearing the costs of vindicating her statutory rights and the same opportunity to employ the class action mechanism that would have been available under the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, in a judicial forum.

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COUNTERSTATEMENT OF THE CASE

On January 25, 1994, respondent Larketta Randolph ("respondent") purchased a mobile home from Better Cents Home Builders, Inc. ("Better Cents") in Opelika, Alabama. *See* Petitioners' Appendix to Petition for Writ of Certiorari ("Pet. App.") 2a. In order to purchase her home, Ms. Randolph received financing through Green Tree Financial Corporation — Alabama, a wholly owned subsidiary of Green Tree Financial Corporation (collectively "petitioners" or "Green Tree"). *Id.* Green Tree's Manufactured Home Retail Installment Contract and Security Agreement ("contract") required Ms. Randolph to purchase "vendors single interest" insurance, which protects a vendor or lienholder against the costs of repossession in the case of a default on her loan. Pet. App. 2a; *see* Joint Lodging ("J.L.") 35, 37.[1] Ms. Randolph was charged $15 for this insurance, *see* J.L. 3, an amount which was not disclosed to her as a finance charge on her Truth in Lending statement. *See* J.L. 35, 37. The contract, in language that was supplied by Green Tree, also contains an arbitration provision which requires that disputes "arising from or relating to" the contract be resolved through arbitration. Pet. App. 2a-3a; J.L. 37. The arbitration provision is at the heart of this appeal.

The arbitration agreement appears in approximately seven point font on the back of the contract, (*see, e.g.,* font) among sixteen different provisions. J.L. 35, 37. The agreement makes no mention of whether there are additional costs associated with arbitration, their amount or who would bear those costs. Similarly, the arbitration agreement fails to state whether, by executing the mortgage agreement, Ms. Randolph agreed to waive her right to prosecute a claim as a class action under the

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1. A copy of the original signed contract appears in the parties' Joint Appendix ("J.A."). J.A. 35-36. Because the original copy of the contract is illegible, an unsigned version is reproduced in the parties' Joint Lodging. J.L. 35, 37. Green Tree has certified that the contract reproduced in the Joint Lodging is a true and correct copy of the contract ultimately signed by Ms. Randolph. J.L. 39.

Truth in Lending Act ("TILA") or the Equal Credit Opportunity Act ("ECOA"). Nor does the arbitration agreement indicate how class claims would be handled in arbitration. By contrast, in capital letters and bold font, the agreement expressly provides that Ms. Randolph would waive any right to pursue claims subject to arbitration before a jury. *See* J.L. 37.

On the day Ms. Randolph purchased her mobile home, a representative from Better Cents brought the contract to her at home and simply instructed her where to sign the document. J.A. 20-21. Ms. Randolph did not have the opportunity to read carefully the installment contract, including the arbitration clause which appeared on the back, and was not told that she was waiving any rights under the agreement. J.A. 20-21, 48-49.

On January 3, 1996,[2] Ms. Randolph filed an action in the United States District Court for the Middle District of Alabama, on behalf of herself and those similarly situated, against Green Tree for: (1) violation of TILA, 15 U.S.C. § 1601 *et seq.*, for failing to disclose the charge of $15 for "vendors single interest" as a finance charge rather than an insurance premium in the TILA disclosure statement; and (2) violation of ECOA, 15 U.S.C. §§ 1691-1691f, for requiring Ms. Randolph to waive statutory causes of action under the Federal Consumer Protection Act by compelling her to arbitrate all claims. Pet. App. 21a-22a; J.A. 22, 26-27 (Second Amended Compl. ¶¶ 1, 24, 27, 28). Green Tree responded to the complaint by moving to stay the action or have it dismissed. J.A. 29-30. Pet. App. 2a. Ms. Randolph opposed enforcement of the arbitration agreement. Pet. App. 2a. In the alternative, she asked the district court to certify a class action before referring it to arbitration. Pet. App. 4a; J.A. 22, 24-25 (Second Amended Compl. ¶¶ 13-20); J.A. 3 (Pl's Resp. & Opp. to Def.'s Mot. to Compel Arb. at 24, Docket No. 10).

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2. *See* J.A. 1 (Compl., Docket No. 1). Ms. Randolph filed amended complaints entered on December 10, 1996, J.A. 22 (Second Amended Compl.), and September 29, 1997, J.A. 10 (Amended Compl., Docket No. 40). Pet. App. 22a n.3.

On November 26, 1997, the district court issued a Memorandum Opinion and Order that, among other things, compelled arbitration, dismissed Ms. Randolph's entire complaint with prejudice and declined to certify the putative class. Pet. App. 50a. Ms. Randolph had argued that Green Tree's arbitration agreement was unenforceable because it completely thwarted her ability to vindicate her statutory rights under TILA, and it violated ECOA, by: (1) imposing on her an intolerable risk of incurring excessive arbitration costs; and (2) failing to provide for class action treatment. Pet. App. 22a, 53a; *see, e.g.*, J.A. 25 (Second Amended Compl. ¶20); J.A. 3 (Pl's Resp. & Opp. to Def.'s Mot. to Compel Arb., at 1-3, 21-24, Docket No. 10); J.A. 5 (Pl.'s Reply at 1-4, 7, Docket No. 17). The district court denied class certification, explaining that "regardless of the wisdom of denying class certification," the failure of the arbitration agreement to provide expressly for class actions precluded the court from entertaining class treatment. Pet. App. 48a.

After the district court denied class certification and ruled that Ms. Randolph's individual claim was arbitrable, she advised the court that:

> Arbitration costs are high. . . . Plaintiff simply does not have the resources to arbitrate. Therefore, Plaintiff's only option in light of [the District] Court's ruling, is to forego any claims that she may have against [Green Tree], which is precisely why this defendant requires an arbitration agreement in each and every one of its contracts.

J.A. 13 (Mot. for Reconsid. at 9, Docket No. 53). Ms. Randolph also introduced evidence that arbitration filing fees for claims below $10,000 were generally $500 and that the average arbitrator's fee per day is $700. *Id.* Green Tree never challenged the high cost of arbitration cited by Ms. Randolph, and never agreed to bear any of those costs. Pet. App. 17a-18a; *see, e.g.*, J.A. 15 (Resp. to Mot. for Reconsid. at 7-8, Docket No. 59). Again, the district court acknowledged that it was

"mindful of the apparent inequitable result of requiring arbitration of TILA and ECOA claims and of not certifying a class, particularly in light of the consumer protection purposes of the Acts. . . ." Pet. App. 53a. Nonetheless, the district court referred the entirety of Ms. Randolph's claims to arbitration. Pet. App. 4a-5a, 48a-49a. Recognizing that there were no claims that would remain before the district court after arbitration was compelled, it ordered the entire action dismissed with prejudice and directed that Ms. Randolph proceed to arbitration for the adjudication of her claims. Pet. App. 4a-5a, 48a-49a, 53a-54a. Ms. Randolph noted an appeal on behalf of herself and others similarly situated.

The Eleventh Circuit reversed the district court's order enforcing the arbitration agreement. Pet. App. 2a. First, the court of appeals held that the "order compelling arbitration was an appealable 'final decision' under 9 U.S.C. § 16(a)(3)" and thus the court had jurisdiction to consider the matter. Pet. App. 2a, 15a. While recognizing the logic of treating orders compelling arbitration as interlocutory where there remain other issues for the district court to resolve — as is the case in most "embedded" proceedings — the Eleventh Circuit concluded that such a "myopic" approach was unwarranted where the district court referred all outstanding claims to arbitration, leaving nothing further for the district court to adjudicate. Pet. App. 8a. In particular, the circuit court concluded:

> In cases like this one . . . where the district court's dismissal of the action leaves no additional issues for it to resolve, treating the distinction between embedded and independent proceedings as decisive makes less sense.

Pet. App. 8a. Refusing to accord the same "talismanic significance" that other circuits have to the distinction between "independent" and "embedded" proceedings, the Eleventh Circuit concluded that the district court's ruling was a final decision, subject to immediate review. Pet. App. 10a-15a.

Second, while recognizing the federal policy in favor of enforcing arbitration agreements, the Eleventh Circuit properly considered the propriety of an arbitration agreement that effectively foreclosed the exercise of statutory rights under TILA and ECOA. Although the Eleventh Circuit determined that Ms. Randolph's claims fell within the scope of the agreement, it reversed the order compelling arbitration because the agreement "fail[ed] to provide minimum guarantees required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration." Pet. App. 18a. This narrowly-worded holding turned on the wording of the agreement and did not foreclose the arbitration of claims arising under TILA or ECOA or the enforcement of arbitration agreements that are properly worded. *Id.*

Although the parties briefed the separate issue of whether the arbitration agreement was unenforceable because it failed to preserve the right of Ms. Randolph and others similarly situated to prosecute their claims as a class action, the Eleventh Circuit did not reach that issue.

SUMMARY OF ARGUMENT

1. The court of appeals properly found that the district court's decision to dismiss Ms. Randolph's case with prejudice was a final decision, subject to immediate review under 9 U.S.C. § 16(a)(3) of the Federal Arbitration Act ("FAA"). 9 U.S.C. § 16(a)(3) (1999). That conclusion is confirmed by the plain language of Section 16(a)(3), which permits appeals from a "final decision," and the prior case law interpreting the term "final decision," by the statutory construction, and by legislative history of Section 16(a)(3).

In enacting Section 16, Congress sought to "clear away the deadwood" and arcane distinctions that had governed appeals of orders relating to arbitration proceedings. Unlike the other parts of this section, Section 16(a)(3) provides that appeals may be taken from a "final decision with respect to an arbitration. . . ." Although Section 16 does not define the term "final decision,"

the Eleventh Circuit properly looked for guidance from the traditional definition of finality given to 28 U.S.C. § 1291, rather than from muddied distinctions between "embedded" and "independent" proceedings, which the balance of Section 16 was enacted to resolve. Pet. App. 10a-11a. Section 1291 permits an appeal from an order that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). By referring Ms. Randolph's claims to arbitration and dismissing the action with prejudice, the district court ended the litigation on the merits in that court. Drawing upon the meaning ascribed to "final decision" in Section 1291 to interpret Section 16(a)(3), the Eleventh Circuit properly held that the decision below was appealable.

Apart from the nearly universal application of this standard of finality, the Eleventh Circuit's approach has the additional virtue of permitting the courts of appeals to focus on the effect of the lower courts' rulings, which is to put a party out of court, not the labels attached to the decisions, in determining whether appeals should be taken. Like orders that dismiss actions so the litigation may be pursued in another forum, which are final and appealable under Section 1291, the dismissal of Ms. Randolph's case was appealable because there was nothing left of her claims after they had been referred to arbitration.

Nor does the policy favoring the enforcement of arbitration agreements dictate a different conclusion. While most of Section 16 was enacted with the goal of postponing appeals of orders compelling arbitration until the proceeding concludes, it is clear that Congress had another purpose for Section 16(a)(3). Moreover, the appeal from the dismissal with prejudice of Ms. Randolph's case is no different from appeals, under Section 16(a)(3), that Green Tree concedes may be taken from orders compelling arbitration in independent proceedings.

The legislative history may very well be dispositive of the interpretation given to Section 16(a)(3). That history reflects that it was Congress' intent that:

> [U]nder the proposed statute, appealability does not turn solely on the policy favoring arbitration. Appeal can be taken from . . . a final judgment dismissing an action in deference to arbitration. These appeals preserve the general policy that appeals should be available where there is nothing left to be done in the district court.

See 134 Cong. Rec. 31,039, 31,065 (1988). Section 16(a)(3) applies equally whether the district court order favors litigation or arbitration and the legislative history confirms that Congress intended to adopt the traditional definition of finality. Accordingly, the Eleventh Circuit correctly held that the district court's order dismissing the entirety of the case before it in deference to arbitration was an appealable, final order under Section 16(a)(3) of the FAA.

2. Although the FAA reflects a federal policy favoring the enforcement of arbitration agreements, its command is not unlimited. Agreements whose terms would undermine, or work a prospective waiver of, the underlying statutory rights may not be enforced. Arbitration must also afford parties a forum that is an adequate alternative to the judiciary for the adjudication of their statutory rights. Green Tree's arbitration agreement failed to comport with these fundamental principles.

By being silent on the amount and allocation of the costs of arbitration, Green Tree's agreement failed to protect Ms. Randolph from the imposition of prohibitive costs. The record below confirmed that the costs to which Ms. Randolph could have been exposed had she proceeded to arbitration would have far exceeded the economic value of her claims. In requiring Ms. Randolph to risk the payment of prohibitive costs as a condition of proceeding to arbitration, Green Tree's agreement chilled the exercise of her statutory rights under TILA and ECOA. Had Green Tree's arbitration agreement been enforced, it would have effectively worked a prospective waiver of her statutory rights. Ms. Randolph's declared intention to abandon her claim if it proceeded to arbitration, because of the potential

costs she would bear, confirmed the effect of this waiver. Moreover, by exposing Ms. Randolph to costs that she would not have borne in the district court, the arbitration provided by Green Tree's agreement was no longer comparable to a judicial forum. The Eleventh Circuit was correct, therefore, it refusing to enforce Green Tree's arbitration agreement.

As an alternative ground for affirming the Eleventh Circuit's ruling, the failure of Green Tree's arbitration agreement to permit Ms. Randolph and others similarly situated to prosecute their TILA claims as a class action, deprived them of the only economically viable way to exercise their statutory rights. Left with claims whose economic damages are modest, the members of the class Ms. Randolph sought to represent will lack the economic incentive to pursue their claims individually. Once again, Green Tree's arbitration agreement effectively will have caused an impermissible waiver of statutory rights. Since Congress expressly contemplated that the potential for class-wide liability would be necessary to secure voluntary compliance with TILA, enforcement of Green Tree's arbitration agreement without the prospect for proceeding collectively will undermine the enforcement scheme contemplated by Congress. Although the Eleventh Circuit did not rely on this ground for invalidating Green Tree's arbitration agreement, the issue is properly before the Court since it was litigated before the district court, briefed and argued before the Eleventh Circuit and presented in Ms. Randolph's Opposition to Green Tree's Petition for Writ of Certiorari.[3] Accordingly, the Eleventh Circuit's decision denying enforcement of Green Tree's arbitration agreement may be affirmed on this ground too.

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3. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) ("[W]ithout cross-petitioning for certiorari, a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals.'") (citation omitted); *Heckler v. Campbell*, 461 U.S. 458, 468-69 n.12 (1983) ("[The Supreme Court] could consider grounds supporting [the] judgment different from those on which the Court of Appeals rested its decision[,]" especially where ground presented was raised below); *see, e.g., Langnes v. Green*, 282 U.S. 531, 539 (1931).

ARGUMENT

I. THE ELEVENTH CIRCUIT PROPERLY FOUND THAT AN ORDER DISMISSING AN ACTION WITH PREJUDICE WAS A FINAL DECISION UNDER 9 U.S.C. § 16(a)(3).

The court of appeals properly found that the district court's decision to dismiss the case with prejudice was a final decision, subject to immediate review under Section 16(a)(3) of the FAA. 9 U.S.C. § 16(a)(3). That conclusion is confirmed by the plain language of Section 16(a)(3) and the prior case law interpreting the term "final decision," by the statutory construction of Section 16(a)(3), and by the legislative history of this section's enactment.

A. The Plain Language Of Section 16(a)(3) And Prior Case Law Interpreting The Term "Final Decision" Indicate That A Dismissal With Prejudice Is A Final Decision.

Invoking Section 16(a)(3) of the FAA, the Eleventh Circuit held that by referring the entirety of Ms. Randolph's statutory claims to arbitration, leaving nothing further to adjudicate, the district court's ensuing dismissal of the action with prejudice qualified as a final decision subject to appeal. Pet. App. 14a-15a. Section 16(a)(3) allows appeals where there has been "a final decision with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3). While Section 16 of the FAA does not define the term "final decision," the meaning of that term has been well established for over half a century. As Green Tree concedes, "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing . . . interpretations." *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998).

Plainly, action by a court qualifies as a final decision, subject to appeal, when it disposes of the issues before the court in their entirety. *See Catlin*, 324 U.S. at 233 (action qualifies as "final decision" when it "ends litigation on the merits and leaves

nothing for the court to do but execute the judgment"). The same standard has long governed the standard route for appeals from final decisions taken pursuant to Section 1291. *See* 28 U.S.C. § 1291 (stating that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.") Under Section 1291, a final, appealable decision is one that "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers*, 437 U.S. at 467 (quoting *Catlin*, 324 U.S. at 233); 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.6, at 526-27 (2d ed. 1992) (stating that an order granting dismissal of all claims among all parties is ordinarily final).[4]

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4. Finality, of course, must be assessed in practical terms. *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). Thus, orders which effectively send parties out of court are deemed to "end litigation on the merits" and, therefore, qualify as final and appealable. *United States v. Lee*, 786 F.2d 951, 956 (9th Cir. 1986); *Herrington v. County of Sonoma*, 706 F.2d 938, 939 (9th Cir. 1983). Similarly, the disposition of a case is final where it dispatches the case from the court, regardless of whether it is being pursued in another forum. *See Mazanec v. North Judson-San Pierre School Corp.*, 750 F.2d 625, 627 (7th Cir. 1984) (Posner, J.). In explaining that a dismissal is final when "there is nothing left of the matter in the federal court," the Seventh Circuit stated:

> The fact that the matter is being pursued before another tribunal is irrelevant. . . . [W]hen a suit in federal court is dismissed on the ground that a state court, or an arbitration board, or an administrative agency has exclusive jurisdiction over the subject matter of the suit, the order of dismissal is a final and appealable order, even though it contemplates further proceedings on the plaintiff's claim in another forum.

Id. See also, e.g., *Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955) (" 'dismissal [under] . . . [*forum non conveniens*] or any other principle puts an end to the action and hence is final and appealable' ") (quoting *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 177 F.2d 360, 362 (4th Cir. 1949) (second alteration in original); *Lopez v. Dean Witter Reynolds*, 805 F.2d 880, 883 (9th Cir. 1986) (order compelling arbitration of all claims is dispositive of the case and is final).

Consistent with this well-established doctrine, the Eleventh Circuit interpreted the term "final decision" in Section 16(a)(3) of the FAA by looking to the "simplest traditional definition of finality: [whether] the decision has disposed of all the issues framed by the litigation, leaving nothing to be done but execute the order." Pet. App. 10a (citing 15B Wright *et al.*, *supra* § 3914.17, at 18-19.) The court of appeals noted that while a number of circuits have "adhered, with a concededly 'myopic[]' focus, to the embedded/independent distinction in determining whether they had jurisdiction to hear an appeal under § 16(a)(3)," Pet. App. 8a (citing *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1213 (7th Cir.), *cert. denied*, 525 U.S. 931 (1998)), nothing in the plain language of the statute requires the courts to make such a distinction decisive.[5] *See* Pet. App. 11a. Instead, the court was informed by the definition of "final decision" which was of long standing when Congress enacted Section 16(a)(3), rather than be guided by the same degree of "talismanic significance," *Napleton*, 138 F.3d at 1211, that other circuits placed on the difference between independent and embedded proceedings. *See* Pet. App. 10a. Congress was well aware of the prior interpretation of final decision when it enacted Section 16(a)(3) and chose to incorporate the term. The action taken by the district court plainly satisfied this standard.

In the district court proceedings, in response to Ms. Randolph's complaint, Pet. App. 4a, Green Tree moved to compel arbitration and to stay the proceedings, or in the alternative, to dismiss the litigation. *See* Pet. App. 22a.

5. Several circuits have held that where a proceeding is "independent" (*i.e.*, where "the motion to compel arbitration . . . is the only claim before the district court"), a final decision ending such litigation is appealable immediately. *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1302 (9th Cir. 1994); *see also Filanto S.p.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60 (2d Cir. 1993). Other circuits have held that where a proceeding is "embedded" (*i.e.*, where the "arbitration issue arises as part of a broader action dealing with other issues"), an order compelling arbitration must be treated as *de facto* interlocutory and not appealable under Section 16(a)(3), despite a stay or dismissal of the underlying claims. *See* Pet. App. 7a.

Thereafter, the district court entered an order which granted Green Tree's motion to compel arbitration, referring both statutory claims to arbitration and denying Green Tree's motion to stay. Because it had disposed of the entirety of Ms. Randolph's claims by referring them to arbitration, leaving nothing before it to adjudicate, the district court also granted Green Tree's motion to dismiss the entire complaint *with prejudice.* Pet. App. 50a.

In recognizing that the dismissal with prejudice of Ms. Randolph's claims qualified as a final decision under the traditional definition of finality, the panel below hardly stood alone. *See Morewitz v. West of England Ship Owners Mutual Protection and Indem. Ass'n.*, 62 F.3d 1356, 1361 (11th Cir. 1995) (court of appeals has jurisdiction to hear appeal under Section 1291 because a dismissal with prejudice of an arbitration case is a final decision); *Nationwide Ins. Co. v. Patterson*, 953 F.2d 44, 46 (3d Cir. 1991) (court of appeals has jurisdiction from a final order pursuant to Section 1291 because "district court's dismissal of . . . action plainly signifies that this arbitration is not a part of any ongoing proceeding"); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635 (9th Cir. 1988) (court of appeals has jurisdiction from district court order dismissing case and ordering arbitration); *Cedar Coal Co. v. United Mine Workers*, 560 F.2d 1153 (4th Cir. 1977) (order dismissing complaint with prejudice, that requested union be compelled to arbitrate and other underlying claims, is final appealable order under Section 1291).[6] Drawing upon the meaning ascribed to

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6. Even dismissals *without prejudice* may be considered final decisions under Section 1291. *See, e.g., Peterson v. BMI Refractories*, 132 F.3d 1405, 1411 (11th Cir. 1998) (finding dismissal of embedded arbitration case without prejudice was final order for purposes of jurisdiction under Section 1291); *Martinez v. Gomez*, 137 F.3d 1124, 1126 (9th Cir. 1998) (finding that dismissal without prejudice would be treated as final order under Section 1291 given that plaintiff was not allowed to amend complaint to defeat a statute of limitations bar and

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"final decision" in Section 1291, therefore, the Eleventh Circuit was well justified in allowing an appeal from the dismissal with prejudice below pursuant to Section 16(a)(3) of the FAA.[7]

Dwelling on the same debate that the enactment of Section 16 was designed to resolve, Green Tree clings to the outmoded distinction between "embedded" and "independent" proceedings to contend that the district court's dismissal with prejudice of Ms. Randolph's claims was a non-appealable order. *See* Brief of Petitioners ("Pet. Br.") 23-25. Prior to the enactment of Section 16 of the FAA in 1988, the courts had grappled with

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court must have intended this order to end the case); *Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 746 (9th Cir. 1993) (stating that if the court intended the dismissal of the complaint to dispose of the entire embedded action in deference to arbitration, that dismissal may be considered a final order).

7. Green Tree's position would deny Ms. Randolph any appeal from the decision referring her statutory claims to arbitration. Ms. Randolph informed the district court that the expected costs of arbitration would have been prohibitive. Accordingly, Ms. Randolph represented in briefing that, if she were compelled to proceed through arbitration alone, rather than on behalf of a class, and without protection against large costs, she would have to "forego any claims that she may have against [Green Tree]." J.A. 13 (Mot. for Reconsid. at 9, Docket No. 53). Where the terms and conditions of arbitration are prohibitive, therefore, the postponement of appellate review of arbitrability until after arbitration concludes would deprive Ms. Randolph and others similarly situated of *any* appeal. This constitutes another basis for concluding that the dismissal of Ms. Randolph's action qualified as an appealable order. *See, e.g., Coopers*, 437 U.S. at 471 (under "death knell" doctrine, "if the court concludes that the ruling, as a practical matter, makes further litigation improbable, it is considered a final decision"); *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1249 (9th Cir. 1997) (Pregerson, J., dissenting) (denial of class certification in TILA case brought by senior citizens with modest claims forced them to proceed individually through costly arbitration or abandon their claims, "effectively sound[ing] a death knell for the entire action."), *cert. denied*, 525 U.S. 921 (1998).

the issue of when appeals could be taken from orders granting or denying stays of statutory claims in deference to arbitration, pursuant to Section 3 of the FAA, and orders granting or denying motions to compel the arbitration of a dispute, pursuant to Section 4 of the FAA. *Cf., Hartford Fin. Sys., Inc. v. Florida Software Servs. Inc.*, 712 F.2d 724, 726 (1st Cir. 1983) (Breyer, J.) (stating that "[u]nder these circumstances, appealability is determined by the arcane but detailed set of rules applying the 'appealability' provisions of §§ 1291 and 1292 to §§ 3 and 4 of the Arbitration Act"). Appellate courts were divided as to when Section 4 motions to compel arbitration, which were brought in conjunction with Section 3 motions to stay while litigation proceedings were ongoing, were independent proceedings and therefore appealable or were embedded proceedings and therefore unappealable. *See, e.g., id.* at 728-29 (Section 4 motion to compel brought together with a Section 3 motion to stay was "embedded" and therefore not final and appealable under Section 1291); *Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co.*, 706 F.2d 155, 157-58 (6th Cir. 1983) (district court's order granting Section 4 motion to compel arbitration and Section 3 motion to stay litigation was final and appealable under Section 1291); *Standard Chlorine of Delaware, Inc. v. Leonard*, 384 F.2d 304, 308 (2d Cir. 1967) (orders compelling arbitration "in the course of a continuing suit" not appealable); *Seaboard Coast Line Railroad Co. v. Trailer Train Co.*, 690 F.2d 1343, 1344 n.1 (11th Cir. 1982) (denial of Section 4 motion to compel in ongoing case appealable). The confusion regarding this variety of approaches developed by the courts was exacerbated by the application of the *Enelow-Ettelson* doctrine, which relied upon the historic distinction between law and equity to determine the appealability of stays issued in connection with arbitration. *Olson v. Paine, Weber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734-42 (7th Cir. 1986) (extensively discussing

the history of the *Enelow-Ettelson* doctrine and its illogical results).[8]

But that debate, and the confusion that it fostered, largely was resolved by enactment of Sections 16(a)(1)(A), (a)(1)(B), (b)(1) and (b)(2) of the FAA. 9 U.S.C. § 16(a)(1)(A), (a)(1)(B), (b)(1), (b)(2). These subsections set forth specific rules governing appeals from orders refusing a stay and denying a motion to compel and prohibiting appeals from interlocutory orders granting stays or compelling arbitration. *See infra* Part I.B. Accordingly, the debate over whether orders granting and denying stays and motions to compel arbitration were appealable, which preceded enactment of these subsections of Section 16, will inform the subsequent interpretations of these subsections. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (where " 'Congress includes particular language on one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' ") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

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8. The *Enelow-Ettelson* doctrine provided that the grant or denial of a stay might be treated as a ruling on injunctive relief and, therefore, be immediately appealable under 28 U.S.C. § 1292(a)(1) where the underlying action historically sounded in law but the defense or counterclaim asserted as the basis for the stay was equitable in nature. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 281 (1988). Ironically, the same grant or denial of a stay which would be found appealable under Section 1292(a)(1), pursuant to the *Enelow-Ettelson* doctrine, would be unappealable under Section 1291. *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 179, 184-85 (1955) (commenting that an order denying a stay would be unappealable under Section 1291, but that it would be appealable under Section 1292 if the underlying action was at law); *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449, 451-2 (1935) (finding an order denying a stay unappealable under the final judgment rule, but appealable as a denial of an injunction because the stay was based upon an equitable defense in an action at law). In 1988, this Court wisely repudiated the *Enelow-Ettelson* doctrine and the arcane rules governing appeals that it spawned. *Gulfstream*, 485 U.S. at 282-83.

Green Tree's claim that this debate also informed the enactment of Section 16(a)(3) and the meaning of "final decision" in that section, however, is misplaced. The judicial debate that preceded enactment of the new rules for appeals set forth in Sections 16(a)(1)(A), (a)(1)(B), (b)(1) and (b)(2) did not resolve the issue of when appeals could be taken from final decisions under Section 16(a)(3), since those subsections addressing appeals from orders pursuant to Sections 3 and 4 of the FAA, provide bases for appeal largely separate from Section 16(a)(3). The context of that earlier distinction is of no consequence here, where finality is determined when the district court has disposed of all issues before it. *See* Fed. R. Civ. P. 41(b), Involuntary Dismissals (stating that after a dismissal, the district court does not retain jurisdiction). Were the standards governing appeals from these different sections conflated, as Green Tree has urged, it would eviscerate the clearly separate grounds for appeal set forth in Section 16(a)(3). Therefore, the meaning of "final decision" in Section 16(a)(3) must be informed by the well-established, clearly articulated standards governing finality in 28 U.S.C. § 1291. *See Lee*, 786 F.2d at 956 (final decision is one "which effectively sends a party out of court"); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1275 (6th Cir. 1990) (Section 16(a)(3) retains the prior definition allowing appeals from final decisions affecting arbitration); *Napleton*, 138 F.3d at 1216-17 (Wood, J., dissenting) (plain language of term final decision in Section 16(a)(3) is a legal term of art and "decisions under § 1291 distinguishing between something that resolves all claims of all parties, and other dispositions, are too legion to cite").

This standard of finality has the additional virtue here of permitting the courts of appeals to focus on the effect of the district courts' rulings, not the labels attached to the decisions, in determining whether appeals may be taken. Rather than dwelling on whether a district court called its order a stay or dismissal, the simple standard used to determine "final decision" in 28 U.S.C. § 1291 focuses instead on the effect of the ruling.

See Lee, 786 F.2d at 955 (stating that court should "focus on the effect of the ruling rather than the label placed on it").

Ironically, Green Tree cites the same principle in challenging the appealability of the district court's order dismissing Ms. Randolph's claims with prejudice. Pet. Br. 24. In a reprise of its earlier argument seeking to commingle Sections 16(a)(1)(A), (a)(1)(B), (b)(1) and (b)(2) with Section 16(a)(3), Green Tree contends that the standards for appeal from a dismissal are no different from orders granting or denying a stay. Pet Br. 23-25. Therefore, Green Tree reasons from this faulty premise, appealability would turn on "an otherwise substanceless distinction between stays and dismissal." *See* Pet. Br. 24 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9 n.8 (1983)). Appeals from orders granting or denying stays, however, are governed by standards that derive from vastly different sources than the standard governing appeals from "final decisions" in Section 16(a)(3). *See infra* Part I.B. Therefore, stays and dismissals are governed by very different rules in Section 16 regarding their susceptibility to appeal. To claim that there is no difference between these actions taken by the district courts is to ignore the actions themselves, and also the history and the structure of the subsections that govern appeals from them.

Green Tree is also mistaken in relying upon *Moses H. Cone* for this proposition. Far from supporting Green Tree's "substanceless distinction" argument, *Moses H. Cone* actually undermines it. In *Moses H. Cone,* the petitioner filed a suit in state court seeking a declaratory judgment that the case was exempt from arbitration. *Moses H. Cone*, 460 U.S. at 7. After the respondent sought to compel arbitration in federal court, the district court issued a stay because both cases dealt with the same issue of arbitrability of the underlying claims. *Id.* at 10. Examining the effect of the district court's action, rather than dwelling on what it was called, this Court determined that the stay constituted a "final decision" that was subject to appeal under Section 1291. *Id.* at 9-11. Although the order issued by

the district court was labeled a stay, this Court affirmed the jurisdiction of the court of appeals to hear the appeal because the order forced the defendant "effectively out of court." *Id.* at 10. In recognizing the effect of the order, this Court concluded that: "We foresee no great difficulty in determining when a district court has surrendered jurisdiction over a federal lawsuit." *Id.* at 10 n.11.

Admittedly, the holding of *Moses H. Cone* is narrow, providing "only that a stay order is final when the sole purpose and effect is precisely to surrender jurisdiction of a federal suit to a state court." *Id.* But the rationale behind the *Moses H. Cone* decision, that the effect of the ruling should govern its appealability, supports the Eleventh Circuit's decision to focus on the effect of the order dismissing the action below in concluding that the order was an appealable final decision. *See also Sullivan v. Finkelstein*, 496 U.S. 617, 627-28 & n.7 (1990) (district court order invalidating regulations of the Secretary of Health and Human Services had the effect of, and thus was, a final order susceptible of immediate review, even though district court did not caption it a final judgment); *Liberty Mutual Insur. Co. v. Wetzel*, 424 U.S. 737, 742 , 744 (1976) (district court order leaving issues unresolved was not final order, despite label to the contrary, because effect of order was not final); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir. 1976) (appealability of an order depends on its effect).

Nor is Green Tree's challenge to the appeal from the dismissal of Ms. Randolph's case consistent with its recognition that appeals are immediately available under Section 16(a)(3) from orders granting motions to compel in independent proceedings. *See* Pet. Br. 25. Green Tree concedes, as it must, that orders compelling arbitration, pursuant to Section 4 of the FAA, are appealable as final decisions when they are issued in independent proceedings. *Id*; *see also Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996) ("[A]n order involving an independent claim is always final."); *Stedor*

Enter., Ltd. v. Armtex, Inc., 947 F.2d 727, 731 (4th Cir. 1991). Notwithstanding that these orders compel arbitration, Green Tree properly recognizes that they are immediately appealable because the ruling has disposed of the entire matter before the district court. Pet. Br. 25.

There is no material difference, however, between appeals from orders compelling arbitration in independent proceedings and the appeal at issue here, which was taken from an order referring Ms. Randolph's statutory claims to arbitration and dismissing her case because the ruling had disposed of the entire matter before the district court. In both circumstances, the rulings on appeal were issued in deference to arbitration and they disposed of the entire matter before the court. The only difference is that in independent proceedings there are no underlying statutory claims at issue, while in Ms. Randolph's case her statutory claims were pending at the time that the district court compelled arbitration. The effect of the rulings in each case, however, is the same: to refer the statutory claims to arbitration and leave nothing further for the court to rule upon. Any distinction over the appealability of these orders turns on the labels given them, not their substance.[9] It makes all the more sense, therefore, to treat orders that dispose of all issues before the district court as final.[10]

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9. Green Tree also conjures up the grim prospect that appeals from embedded proceedings, even those where the district court referred all statutory claims to arbitration, will proceed piecemeal. *See* Pet. Br. at 26-27. Orders that dismiss actions with prejudice in embedded proceedings, however, will not lead to piecemeal appeals since no pieces of the litigation will remain behind.

10. As the Eighth Circuit has warned, the logic of Green Tree's position could lead to absurd results. *See Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994). If appeals remain available from orders issued in independent proceedings, but are denied from orders dismissing with prejudice the entire action in an embedded proceeding, this scheme will promote races to the courthouse to control the form of the proceeding. "If a party anticipates that an opponent will

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B. The Structure Of Section 16 Confirms That The Dismissal With Prejudice Of Ms. Randolph's Claim Was Immediately Appealable.

The structure of Section 16 reflects an intention by Congress to permit the appeal taken from the dismissal of Ms. Randolph's case. While other subsections of Section 16 were enacted expressly to limit appeals from orders favoring arbitration, Congress imposed no such limitations on appeals taken pursuant to Section 16(a)(3). Green Tree's assertions to the contrary are mistaken. Pet. Br. at 19.

Congress enacted Section 16 in an effort to bring some order to the jurisprudence governing appeals from orders regarding arbitrations governed by the FAA. *See Napleton*, 138 F.2d at 1217 (Wood, J., dissenting) (explaining that "Section 16 was enacted . . . in order to furnish a clear rule for appealability of orders relating to arbitration proceedings."); 15B Wright *et al.*, *supra* § 3914.17, at 7. In the hope of avoiding misunderstanding, Congress set forth specifically whether appeals could be taken from orders granting and denying stays and motions to compel arbitration, addressing each scenario in a separate subsection. Thus, Section 16(a)(1)(A) expressly provides for an appeal from an order "refusing a stay of any action under section 3 of this title." 9 U.S.C. § 16(a)(1)(A). Likewise, Section 16(a)(1)(B) allows an appeal from an order "denying a petition under section 4 of this title to order arbitration to proceed." *Id.* at § 16(a)(1)(B). In contrast, Section 16(b)(1) ordinarily precludes appeals from interlocutory orders "granting a stay of any action under section 3 of this title." *Id.* at § 16(b)(1). Similarly, Section 16(b)(2) forecloses

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move to compel arbitration [within an embedded proceeding], and that party wishes to have quick appellate review of that decision, it need simply bring an independent action to resolve that question." *Id.* at 96. This is hardly the way our system of laws should work.

appeals from interlocutory orders "directing arbitration to proceed under section 4 of this title." *Id.* at § 16(b)(2).[11]

In still other subsections of Section 16, Congress provided specifically for appeals from orders issued after district courts reviewed arbitration awards. Therefore, Section 16(a)(1)(D) allows appeals from orders "confirming or denying confirmation of an award or partial award." 9 U.S.C. § 16(a)(1)(D). Similarly, Section 16(a)(1)(E) permits appeals from orders "modifying, correcting, or vacating an award." *Id.* at § 16(a)(1)(E).

By enacting Section 16(a)(3), Congress plainly contemplated appeals under circumstances other than those addressed specifically by the subsections set forth above. Despite Green Tree's argument that every subsection of Section 16 should be read with a pro-arbitration tilt, Pet. Br. 27, neither the statutory language nor the legislative history, *see infra* Part I.C., indicate that appellate jurisdiction for all appeals from orders compelling arbitration should be denied.[12] Where the drafters wanted to ensure arbitration came before an appeal, they said so explicitly in the other subsections. If Section

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11. The order compelling arbitration below, moreover, is not subject to Section 16(b)(2) because it is not interlocutory. Interlocutory orders fail to dispose of an entire action, leaving some matters to be adjudicated by the district court. *See, e.g., Merle's, Inc. v. C.C. Synoground*, 481 F.2d 1016, 1018 (9th Cir. 1973). By referring all of Ms. Randolph's claims to arbitration, the district court disposed of the entire case. As discussed more fully below, the possibility that the parties might later seek post-arbitration relief does not transform the order into an interlocutory one.

12. Having recognized that appeals may be taken from orders compelling arbitration in independent proceedings, Green Tree cannot fairly argue, as it has, that the FAA policy favoring enforcement of arbitration agreements precludes appeals from orders compelling arbitration under Section 16(a)(3). Pet. Br. 22-23, 25, 27. The availability of appeals from orders compelling arbitration in independent proceedings demonstrates that Green Tree's repeated invocation of a "pro-arbitration meaning" to challenge the appeal below is too simplistic. *See, e.g.*, Pet. Br. 22-23, 27.

16(a)(3) were intended to be a regurgitation of the other sections, as Green Tree argues, Pet. Br. at 27, Congress would not have used the term "final decision," a term imbued with decades of meaning. *See Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 568, n.27 (1990) (stating that courts "have a duty to be faithful to congressional intent when interpreting statutes and are not free to consider whether, or how, the statute should be rewritten").

Nor can the possibility that, after arbitration has concluded, parties may apply for post-arbitration relief, vitiate the finality of a dismissal with prejudice, as Green Tree has argued. Pet. Br. at 25-26. First, Section 9 provides that confirmation of an award must be made by application to a court and Section 10 provides for a similar mechanism to vacate an arbitration award. 9 U.S.C. §§ 9, 10. The statutory scheme, however, makes clear that availability of such post-arbitration relief did not alter the finality of dismissal with prejudice below. Since Section 16 separately provides for appeals from orders granting or denying post-arbitration relief, Congress could not have intended to preclude appeals from a dismissal with prejudice pursuant to Section 16(a)(3) simply because post-arbitration relief might later be sought by either party.[13] Holding otherwise would render Section 16(a)(3) superfluous. *See Mackey v. Lanier*, 486 U.S. 825, 836 (1988) (explaining that this Court is "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law").

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13. Similarly, Green Tree cites *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 86 (2d Cir. 1961), for the proposition that an "arbitration cannot produce an enforceable result without further judicial action" and extrapolates, therefore, that a district court's dismissal with prejudice in favor of an arbitration cannot be a final decision because of a later confirmation of the award. However, the petitioners overstate *Lummus*. Not only was *Lummus* not discussing final decisions in this context, but *Lummus* was written before Section 16 was enacted, before, therefore, the enactment of separate provisions allowing appeals after confirmation, modification, or vacation of an award. *See, e.g.*, 9 U.S.C. § 16(a)(1)(D)-(E).

Second, the confirmation of an arbitration award is simply akin to the execution of a judgment in a judicial forum. *See Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) (" '[C]onfirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.' ") (quoting *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984)); *Professional Adm'rs Ltd. v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639, 642 (6th Cir. 1987) ("[A]n action to confirm the award should be a summary proceeding, not a proceeding in which the defendant seeks affirmative relief."). Thus the prospect that the statutory claims referred to arbitration might later be subject to judicial confirmation does not vitiate the finality of the order dismissing the underlying action with prejudice. *See Coopers*, 437 U.S. at 467 (final decision "'ends the litigation on the merits and *leaves nothing for the court to do but execute the judgment*'") (quoting *Catlin*, 324 U.S. at 233) (emphasis added).

Third, the permissive nature of the post-arbitration relief authorized by Sections 9 and 10 and the venue in which that relief may be obtained, underscores the likelihood that Congress had no intention of requiring the district court below to retain jurisdiction after referring all claims to arbitration. *See Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 120 S. Ct. 1331, 1339 (2000). Otherwise, district courts would be required to retain jurisdiction on the chance that a party might seek post-arbitration relief and choose that venue in which to pursue it. Surely the finality of the district court's order dismissing Ms. Randolph's case with prejudice cannot be affected by such an uncertain course of events.

Nor may Section 3 of the FAA properly be read to preclude a district court that referred all claims before it to arbitration, from issuing an order dismissing the case that is final and appealable. *See* 9 U.S.C. § 3. Nothing in the language of the section nor the structure of the FAA contemplates such an extraordinary result. Section 3 requires a district court to stay

the trial of an underlying action until the conclusion of arbitration, upon application by a party and satisfaction that the issue stayed may be referred to arbitration. *Id.* Nothing in Section 3, however, forecloses the dismissal of the action where all the underlying claims have been referred to arbitration. Nor is there any indication that Congress intended Section 3 to suspend application of the ordinary rules of finality where the district court would otherwise be authorized to dismiss the action before it with prejudice. As the overwhelming majority of courts considering this issue have concluded, Section 3 simply requires the issuance of a stay where one or more, but not all, issues before the court are arbitrable. Where all issues before a court are referable to arbitration, however, the district court should dismiss the action. *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (" '[W]e do not believe the proper course is to stay the action pending arbitration. Given our ruling that all issues raised in this action are arbitrable and must be submitted to arbitration, retaining jurisdiction and staying the action will serve no purpose.' . . . [T]he district court acted within its discretion when it dismissed this case with prejudice.") (quoting *Sea-Land Serv. Inc. v. Sea-Land of Puerto Rico, Inc.*, 636 F. Supp. 750, 757 (D.P.R. 1986)); *Hensel v. Cargill, Inc.*, 198 F.3d 245, 1999 WL 993775 at *4 (6th Cir. 1999) ("Under § 3 of the FAA, if any separate claim is referable to arbitration, then a stay of proceedings on the remaining claims is mandatory. However, litigation in which all claims are referred to arbitration may be dismissed."); *Bercovitch v. Baldwin School*, 133 F.3d 141, 156 (1st Cir. 1998) (dismissal, rather than stay, is proper where all issues are arbitrable); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 179 (3rd Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999) (stating that if all claims involved in an action are arbitrable, a court may dismiss the action instead of staying it); *Sparling*, 864 F.2d at 638 (Section 3 does not preclude dismissal). "Since there are no live controversies before this court, the appropriate procedure is dismissal of the action." *Sea-Land Serv.*, 636 F. Supp. at 757-58 (citing *Moses H. Cone*, 460 U.S. at 13).

C. The Legislative History Of Section 16(a)(3) Confirms That The District Court's Dismissal Of The Action Was A Final, Appealable Decision.

The legislative history of Section 16(a)(3) strongly confirms that the Eleventh Circuit was correct in treating the dismissal with prejudice of Ms. Randolph's action as an appealable order. Indeed, this history may be dispositive of the issue. *See Arnold*, 920 F.2d at 1274-75.

Upon the suggestion of the Judicial Conference of the United States, Congress enacted what is now Section 16 to clarify the rules of appellate review of decisions regarding arbitration.[14] In 1986, the ABA proposed H.R. 4975 to amend Title 9 of the United States Code. Although the bill died in committee, the Judicial Conference "unanimously approved the proposed legislation at its 1986 annual meeting." Letter from Edgar H. Brenner, Chairman of the ABA Arbitration Committee to Rep. Kastenmeier at 3 (Mar. 6, 1987); *see also Report of the Proceedings of the Judicial Conference of the United States*, 59-60 (Sept. 18-19, 1986) (reporting that the Judicial Conference voted to support the legislation).

The Judicial Conference adopted Section 16 as its own, and incorporated it into its proposed omnibus bill to reform the judiciary. *See* Judicial Branch Improvements Act of 1987, S. 1482, 100th Cong, introduced as § 616 (1988). In March 1987, at the request of the Judicial Conference of the United States, Senator Heflin introduced S. 1482. 134 Cong. Rec. 31,039, 31,050 (1988) (statement of Sen. Heflin). Section 616 of S. 1482 amended Title 9, and contained the text of today's Section 16 of the FAA.

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14. In 1988, Congress enacted an addendum to the FAA, which contained provisions that controlled the appealability of district court decisions relating to arbitration. These were initially codified in Section 15 of the FAA. In 1990, these jurisdictional provisions were renumbered and moved to Section 16. *See generally Perera v. Siegel Trading Co.*, 952 F.2d 780, 782 (7th Cir. 1992).

In March, April and May 1988, the Subcommittee of the Senate Judiciary Committee on Courts and Administrative Practice held hearings on S. 1482. 134 Cong. Rec. at 31,050. On March 14, 1988, Judge Elmo B. Hunter and Judge Richard M. Bilby testified on behalf of the Judicial Conference on S. 1482 and submitted a written section by section analysis on behalf of the Judicial Conference to accompany their testimony, which clearly enunciated the intent and purpose of Section 16(a)(3).

The prepared statement of the Judicial Conference of the United States, submitted to the Judiciary Committee during hearings on the proposed amendments to the FAA, explains the intent of Section 16(a)(3):

> [U]nder the proposed statute, *appealability does not turn solely on the policy favoring arbitration.* Appeal can be taken from final judgments, including a final judgment in an action to compel arbitration, a final judgment that refuses to enjoin arbitration, or *a final judgment dismissing an action in deference to arbitration.* These appeals preserve the general policy that appeals should be made available *where there is nothing left to be done in the district court.*

Judicial Branch Improvements Act of 1987, Hearings on S. 1482 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary, 100th Cong. 85-86. (1988) (statement of Judge Elmo B. Hunter and Judge Richard M. Bilby on behalf of the Judicial Conference of the United States) (emphasis added). Thereafter, the Senate adopted this precise language as the legislative history of Section 16(a)(3). *See* 134 Cong. Rec. at 31,065 (1988) (Section by Section Analysis, incorporating, in whole, quoted statement of Judicial Conference regarding Section 16(a)(3)). Ultimately, the legislation proposed by the Judicial Conference was enacted into law and codified at Section

16(a)(3). *See* Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, Title X, § 1019(a), 102 Stat. 4671 (1988); *see also Arnold*, 920 F.2d at 1274 (stating that Section 15 of the FAA, later renumbered Section 16, was enacted by Congress, acting upon the 1986 recommendations of the Judicial Conference in order to clarify appealability standards).

This highly relevant legislative history informed the Eleventh Circuit's interpretation of Section 16(a)(3) as it should here. Other parts of Section 16, for example, which allow appeals from orders refusing a stay of an action or denying a motion to compel arbitration, *see* § 16(a)(1)(A)-(B), reflect a decided policy favoring the enforcement of arbitration agreements; in contrast, the legislative history reveals that enactment of Section 16(a)(3) was not animated by the same sentiment.

Instead, Section 16(a)(3) was intended to permit appeals from "a final judgment dismissing an action in deference to arbitration." 134 Cong. Rec. at 31,065. Echoing the standard articulated for appeals under 28 U.S.C. § 1291, this history confirms that appeals may be taken "where there is nothing left to be done in the district court." *See Arnold*, 920 F.2d at 1275. Unlike the other parts of Section 16, this subsection does not distinguish between appeals from decisions favoring arbitral and judicial forums. *See, e.g., John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 136 (3rd Cir. 1998) (when decision is final, it does not matter whether holding favors arbitration or litigation); *Arnold*, 920 F.2d at 1275 (Section 16 retains its prior meaning "allowing appeals from final decisions whether or not they direct or refuse to direct arbitrations"); *Stedor*, 947 F.2d at 731 ("Section 16(a)(3) . . . applies equally whether the district court order favors litigation or arbitration" and the legislative history "confirms that Congress intended to adopt the traditional definition of final"); *Perera*, 951 F.2d at 783 ("[A]s for decisions favoring arbitration . . . final decisions granting arbitrations are appealable.").

Accordingly, the Eleventh Circuit correctly held that the district court's order dismissing the case before it in deference to arbitration was an appealable, final order under Section 16(a)(3) of the FAA, and that such dismissals do give rise to final orders.

II. THE ELEVENTH CIRCUIT PROPERLY HELD UNENFORCEABLE AN ARBITRATION AGREEMENT WHICH COMPROMISED — IF NOT EVISCERATED — MS. RANDOLPH'S ABILITY TO ENFORCE HER STATUTORY RIGHTS UNDER TILA.

There is no dispute that the FAA reflects a policy favoring enforcement of freely negotiated agreements to arbitrate. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). Nothing in the Eleventh Circuit's ruling undermines that policy.

Notwithstanding the regard that must be given to the federal policy favoring arbitration, however, there is an equally compelling federal policy that cautions against the enforcement of arbitration agreements which impair the exercise of underlying statutory rights. The enforcement schemes created by Congress when it enacted TILA and ECOA would be greatly compromised if claims arising under those statutes were submitted to an arbitral forum in which plaintiffs would bear costs substantially greater than those borne in a judicial forum and would relinquish their ability to join collectively to prosecute their statutory rights. Recognizing Green Tree's arbitration agreement failed to protect against the imposition of prohibitive costs on plaintiffs with claims under TILA and ECOA, the Eleventh Circuit properly barred enforcement of the agreement as it was drafted.

Similarly, the district court interpreted the arbitration agreement's terms, drafted by Green Tree, to bar Ms.

Randolph from prosecuting her TILA and ECOA claims through a class action, as she had sought to do in the court. Although the Eleventh Circuit failed to reach the question of whether an arbitration agreement may be enforced which, by foreclosing class actions under TILA, impairs that statute's enforcement scheme, it has been properly raised before this Court as an alternative basis to affirm the circuit court's decision declining enforcement of the agreement as it was drafted.

Where the terms of an arbitration agreement impede the enforcement of a party's underlying statutory rights, the enforcement of the agreement would work a "prospective waiver of a party's right to pursue statutory remedies. . . ." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). In those circumstances, this Court should have no "hesitation in condemning the agreement as against public policy." *Mitsubishi Motors*, 473 U.S. at 637 n.19. *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) ("[T]here can be no prospective waiver of an employee's rights under Title VII."). Green Tree's arbitration agreement effectively bars Ms. Randolph and members of the putative class from vindicating their statutory rights. The agreement forces them to risk paying potentially large arbitration costs and prohibits the use of the class action mechanism, a device Congress clearly contemplated as essential to the effective private enforcement of TILA. Exposed to the risk of high costs and deprived of the chance to proceed collectively, Ms. Randolph and the class she sought to represent would be deterred from exercising their rights under TILA and ECOA. Enforcement of Green Tree's arbitration agreement thus would effectuate a "prospective waiver" of their rights under TILA and ECOA. The Court should have no hesitation, therefore, in "condemning the agreement as against public policy." *Mitsubishi Motors*, 473 U.S. at 637 n.19.

A. The Arbitration Agreement Was Unenforceable Because It Failed To Ensure That The Costs Ms. Randolph Would Bear In Arbitration Were No Greater Than Those That Would Be Borne In Court.

The Eleventh Circuit correctly held Green Tree's arbitration agreement unenforceable because it failed to protect against exposing Ms. Randolph and other consumers with claims of limited monetary value to exorbitant arbitration costs which would discourage them from exercising their rights under TILA and ECOA. There is no comparable risk of exposure to high and unknown costs for litigants who proceed in the courts. The federal policy favoring the enforcement of arbitration agreements is predicated on the assumption that the statutory rights accorded to the parties will not be diminished by the choice of the forum in which they are exercised. *See Mitsubishi Motors*, 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) ("So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."). Because Green Tree's arbitration agreement created the risk that Ms. Randolph and the putative class members would bear costs that exceeded those borne in the courts, arbitration was no longer just "another forum." *Mitsubishi Motors*, 473 U.S. at 628. It became a forum in which the costs would not only discourage Ms. Randolph and others from proceeding to exercise their statutory rights, but would in fact preclude them from doing so. As such, the agreement is not enforceable.

1. The Imposition Of Excessive Arbitration Costs And Fees Will Discourage Parties From Exercising Their Statutory Rights.

Costs are virtually unique in their power to discourage parties from exercising their rights. Not surprisingly, therefore, courts have declined to enforce arbitration agreements where they impose costs that would so freight the exercise of statutory rights as to risk, or cause, the waiver of those rights.[15] In *Shankle v. B-G Maintenance of Colorado, Inc.*, 163 F.3d 1230 (10th Cir. 1999), for example, the Tenth Circuit struck down an arbitration agreement that required an employee to be responsible for half of the arbitrator's fees — an amount estimated between $1,875 and $5,000. *Id.* at 1234-35. The court concluded that the agreement placed the employee "between the proverbial rock and a hard place — it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum." *Id.* at 1235. Similarly, in *Pitchford v. Oakwood Mobile Homes, Inc.*, the Court found an otherwise valid arbitration agreement unenforceable because its fee schedule dissuaded a plaintiff of limited means from proceeding in the arbitral forum. *Pitchford*, No. 5:99CV00053, 1999 U.S. Dist. LEXIS 20596, at *26-30 (W.D. Va. Dec. 20, 1999). Confronted with an agreement that required the plaintiff to share arbitrator fees in excess of a thousand dollars, the court held that the fees "present[ed] an insurmountable economic barrier for vindicating plaintiff's claims in the arbitrable forum." *Id.* at *29-30; *see also Hornstein v. Mortgage Mkt., Inc.*, Civ. No. 98-1104-AA, 1999 U.S. Dist. LEXIS 21463, at *3, 9 (D. Or.

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15. Individuals against whom arbitration agreements are enforced should bear those costs for which they could reasonably have expected to be responsible in a judicial forum. Costs which exceed that level jeopardize the status of arbitrations as a forum comparable to the courts. *See Gilmer*, 500 U.S. at 26; *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997).

Jan. 7, 1999) (holding unenforceable arbitration agreement that required parties to split arbitration costs and concluding that agreement "unabashedly violates the letter and spirit of the FLSA" and state law "by denying the basic right of participation in the adjudicatory process."); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 255 (S.D.N.Y. 1998) (arbitration agreement unenforceable where there was the potential that it would impose financial burdens on the plaintiff's access to the arbitral forum, "surely deter[ing] the bringing of arbitration" and running counter to the underlying purpose of Title VII) (quotation omitted);[16] *Brower v. Gateway 2000*, 676 N.Y.S.2d 569, 571, 574 (N.Y. App. 1998) (minimum, non-refundable filing fee of $500 and potential for additional $1,000 in arbitration costs led court to conclude "excessive cost factor" in arbitration agreement was "unreasonable and surely serves to deter the individual consumer form invoking the process. . . . Barred from resorting to the courts by the arbitration clause in the first instance, the designation of a financially prohibitive forum effectively bars consumers from this forum as well; consumers are thus left with no forum at all in which to resolve a dispute."); *Meyers v. Terminix Int'l Co.*, 697 N.E.2d 277, 280-81 (Ohio Ct. App. 1998) (holding arbitration agreement unenforceable where homeowner was unaware of non-refundable $2,000 filing fee and such fee "would prevent a consumer of limited resources from having an impartial third party review his or her complaint").[17] Notwithstanding

16. *See also Paladino v. Avnet Computer Techs. Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (where employer did not "promise" to pay for arbitrator's time, leaving employee with potential liability for "at least half the hefty cost of an arbitration" in addition to "steep [AAA] filing fees[,]" employer's arbitration agreement was contrary to the statutory policy of Title VII and thus unenforceable).

17. *See also Jones v. Fujitsu Network Communications, Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999) (holding unenforceable a (Cont'd)

its silence on the amount and allocation of arbitration costs, Green Tree's agreement is nonetheless infirm because it creates the risk that Ms. Randolph and others would bear substantial costs, discouraging them from pursuing their statutory rights altogether.

2. The Record Below And Other Sources Demonstrate That, By Proceeding To Arbitration, Ms. Randolph Risked Exposure To Substantial Costs Associated With Arbitration.

In this case, like others, the costs and fees associated with arbitration may be substantial. Ms. Randolph presented evidence below of the potentially high costs associated with arbitration and her concerns that such costs would preclude her from pursuing her statutory claims.[18] Here, Ms. Randolph made the best record possible of the costs of arbitration to which Green Tree's arbitration agreement might expose her. In the district court, Ms. Randolph quoted a survey conducted by the American Arbitration Association which concluded that arbitrator fees alone are about $700 per day. *See* J.A. 13 (Mot. for Reconsid. at 8-9, Docket No. 53). She also offered

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(Cont'd)
fee-splitting provision in arbitration agreement on basis that "the prohibitive cost substantially limits the use of the arbitral forum"); *Matter of Arbitration Between Teleserve Systems, Inc. and MCI Telecommunications Corp.*, 659 N.Y.S.2d 659, 664 (N.Y. App. 1997) (holding unenforceable arbitration clause mandating $4,000 plus .5% flat filing fee, or $204,000, as "patently excessive," and concluding "[t]he practical effect of such an oppressive and burdensome fee is to bar arbitration of petitioner's claims").

18. Arbitration here would not necessarily have been less expensive than proceeding in court. Had Ms. Randolph been permitted to proceed in court individually, rather than compelled to pursue arbitration, she could have prosecuted her claim in the small claims court for Bullock County, Alabama where she resides. The filing fee there is $57.

data that the typical filing fee for claims below $10,000 is $500. *Id.*

It is not surprising that Ms. Randolph was unable to present additional evidence of the actual costs of arbitration that she would have confronted. As the Eleventh Circuit concluded, Green Tree apparently entrusted broad discretion to its arbitrators, leaving the amount and allocation of costs to their discretion. Pet. App. 17a-18a.

Evidence from other sources, however, confirms that arbitration costs could be prohibitive, certainly dwarfing the $15 value of Ms. Randolph's actual damages. *See Cole*, 105 F.3d at 1480-81 n.8 ("arbitrators' fees are commonly $500 to $1,000 or more per day"); *Shankle,* 163 F.3d at 1235 (arbitrator's fees estimated at "between $1875 and $5000"); *Paladino*, 134 F.3d at 1062 (filing fee of $2,000). Other costs associated with arbitration, such as fees for telephonic and in-person hearings, room rentals, court reporters and transportation could boost the costs of arbitration to levels that are even more unaffordable. *See, e.g., Jones*, 81 F. Supp. 2d at 693 (average arbitration would cost $1,875 to $7,000 for arbitrator's fee, court reporter's fee, transcripts and facility charges). Ms. Randolph made a record of the possible costs sufficient to contend that they were prohibitive.

3. Green Tree's Arbitration Agreement Created A Risk That Ms. Randolph Would Bear Prohibitive Costs.

Notwithstanding that Green Tree's arbitration agreement was silent as to the amount and allocation of costs, it nonetheless posed a very real risk that Ms. Randolph would have borne prohibitive costs had she proceeded to commence the arbitration to which the district court ordered her. The failure to specify the amount and allocation of arbitration costs, therefore, created the same deterrent to exercise statutory rights that has been condemned by courts reviewing large costs specified in agreements.

Green Tree's approach to the litigation below reinforced Ms. Randolph's fears that she would bear substantial costs if she proceeded to arbitration. After the litigation began and Ms. Randolph asserted that the costs of arbitration would be prohibitive, Green Tree never offered to delineate the amount, or range, of costs that could be expected in arbitration. *See* Pet. App. 17a-18a. As the Eleventh Circuit found, Green Tree was not even able, or refused, to specify the rules that it expected would govern the arbitration process. *Id.* The court of appeals properly construed Green Tree's silence in its arbitration agreement as an unwillingness to bear such costs, Pet. App. 17a-18a, and Ms. Randolph's fears of incurring the costs were well-founded.

Nor could Ms. Randolph reasonably have been expected to commence the arbitration in order to ask the arbitrator assigned to the proceeding about the costs of arbitration. At that point, she would have already incurred costs of going forward. The price of inquiring about the costs of arbitration cannot be to incur the costs themselves.[19]

Confronted with another arbitration agreement which failed to specify the amount or the allocation of costs, the Court of Appeals for the District of Columbia Circuit expressed such great concern over the risk that the uncertainty would chill the exercise of the underlying statutory rights that it interpreted the agreement to specify the cost allocation.

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19. Although the FAA provides for an opportunity to obtain modification of an award on grounds that might include a challenge to the costs as excessive, *see* 9 U.S.C. § 11, the failure of the agreement here to establish standards for the allocation of costs makes the outcome of that process hard to predict. Ms. Randolph would have to risk incurring the costs of arbitration before she could seek judicial review and without any standard by which to assess the likelihood of prevailing in the review. Such a procedure hardly provides adequate protection against the imposition of prohibitive costs, leaving a prudent individual understandably hesitant about exercising statutory rights in arbitration.

Cole, 105 F.3d at 1477-81, 1483-86. Like Ms. Randolph, the plaintiff in *Cole* was required to execute an arbitration agreement that failed to provide for an allocation of the arbitration costs. *Id.* at 1480-81. Relying upon *Mitsubishi Motors*, 473 U.S. at 628 and *Gilmer*, 500 U.S. at 26, D.C. Circuit concluded that plaintiffs should no more pay the fees of an arbitrator than they should compensate the judges before whom they appear. *Cole*, 105 F.3d at 1482. To conclude otherwise, would impair access to the arbitration, creating the risk of a prospective waiver of statutory rights that would jeopardize the arbitration agreement altogether. *Id.*

Notwithstanding the risk that Ms. Randolph would bear these costs, the district court here simply enforced the unclear agreement. Pet. App. 4a-5a, 48a-50a, 53a-54a. Other courts have declined to enforce ambiguous or unclear arbitration agreements or terms, concluding that these deficiencies should be construed against the drafter. *See Mastrobuono*, 514 U.S. at 62-63 ("Respondents drafted an ambiguous [arbitration] document, and they cannot now claim the benefit of the doubt."); *see also Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 17-19 (1st Cir. 1999); *Paladino*, 134 F.3d at 1059-60. The same should have occurred here.[20]

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20. Of course, the FAA grants district courts the authority to determine whether defects in arbitration agreements preclude their enforcement. *See* 9 U.S.C. § 3, 4. Even where agreements suffer from a fatal flaw, such as afflicted Green Tree's agreement, the district courts may condition enforcement of agreements on their reformation to bring them into conformity with the underlying statutory provisions. *See generally Evans v. Jeff D.*, 475 U.S. 717, 726-27 (1986).

4. The Fee Shifting Provisions Of TILA And ECOA Do Not Save Green Tree's Arbitration Agreement.

In an effort to salvage its arbitration agreement, Green Tree asserts that its agreement specifies the allocation of costs because it provides the arbitrator with the power to award all remedies available under the applicable laws.[21] Pet. Br. at 37-38. While TILA and ECOA each have fee-shifting provisions,[22] which may apply by virtue of this contract provision, they fail to protect Ms. Randolph from the imposition of prohibitive costs and from the consequent impairment of statutory rights that render the agreement unenforceable.

This Court's interpretations of the taxable costs that may be shifted to a prevailing plaintiff, pursuant to 28 U.S.C. § 1920, would not include arbitration costs. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), this Court held that federal courts may only shift those costs to a losing party where they are specified in 28 U.S.C. § 1920. *Id.* at 440. In *Crawford*, the prevailing plaintiff in a Title VII case sought reimbursement of expert witness fees pursuant to Fed. R. Civ. P. 54(d), which provides for the award of costs to a successful party. *Id.* at 438-42. Because expert witness fees were not one of the costs specified in Section 1920 and there was no "explicit statutory or contractual

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21. However, Green Tree's arbitration agreement only grants the arbitrator "all powers provided by the law[;]" it does not require the arbitrator to invoke them. J.A. 37. Therefore, under the arbitration agreement, the arbitrator need not follow the fee-shifting provisions of TILA and ECOA. The same is true regarding the award of statutory damages.

22. The fee-shifting provisions in TILA and ECOA are found at 15 U.S.C. § 1640(a)(3) and 15 U.S.C. § 1691e(d), respectively.

authorization for the taxation of" expert witness fees as costs in Rule 54(d) or elsewhere, this Court held that the lower court was "bound by the limitations set out in 28 U.S.C. . . . § 1920" and thus prohibited taxing expert witness fees as costs. *Id.* at 441-42, 445; *see also West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 86-87 (1991) (holding that Section 1920 governed federal court's power to shift expert witness fees to losing party and that 42 U.S.C. § 1988's provision for "reasonable attorney's fee" was insufficient to repeal Section 1920).

Thus, a plaintiff who brings a successful action under TILA or ECOA may seek to recover only those costs defined by Section 1920. *See, e.g., Smith v. Chapman*, 436 F. Supp. 58, 66 (W.D. Tex. 1977) (awarding Section 1920 costs to prevailing party in TILA action); *Thomas v. First Fed. Sav. Bank of Indiana*, 659 F. Supp. 421, 424-25 (N.D. Ind. 1987) (awarding Section 1920 costs to prevailing party in ECOA action). None of the categories of expenses listed in Section 1920 can reasonably be read to cover the cost of an arbitrator's time or the additional expenses of arbitration. Nor is there any "explicit statutory or contractual authorization for the taxation" of arbitration expenses set forth in the arbitration agreement here.[23]

Moreover, even if the costs of arbitration were covered by the fee shifting provisions of TILA and ECOA, such costs would only be recoverable in the event that Ms. Randolph prevailed on her statutory claims. Thus, to vindicate her statutory rights under the agreement, Ms. Randolph would have had to be willing to risk incurring large arbitration costs and fees. This risk would greatly deter consumers from

23. Where Congress has allowed additional expenses to be shifted pursuant to Section 1920, it has expressly provided for them. For example, Congress allowed the award of expert witness fees as costs in fee shifting provisions of the Clean Air Act and the Civil Rights Act of 1991. *See, e.g.*, 42 U.S.C. §§ 7604(d), 7607(f); 42 U.S.C. § 2000e-5(k).

prosecuting their claims and would act as a prospective waiver of their substantive rights.

B. The Arbitration Agreement Is Unenforceable Because It Prevents Ms. Randolph And Putative Class Members From Proceeding On A Class Basis, Thereby Effectively Denying A Remedy To The Entire Class.

The failure to permit Ms. Randolph to prosecute her claim as a class action constitutes an alternative ground on which to affirm the Eleventh Circuit's order barring enforcement of the arbitration agreement. Green Tree's use of arbitration clauses in its financial agreements that fail to permit class treatment of the underlying claims is a transparent attempt to immunize itself from liability. Were the arbitration agreement at issue here enforceable, Green Tree would have effectively foreclosed the pursuit of class actions under TILA, the availability of which Congress regarded to be essential to the enforcement of the statute.

1. This Court Has Long Recognized The Critical Function Of The Class Action Mechanism In The Private Enforcement Of Statutory Rights Where The Value Of Individual Claims Are Limited.

Class actions play a vital role in enabling consumers with small individual claims, like Ms. Randolph and others, to prosecute their claims. This Court has stated:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's . . . labor.

Amchem Products, Inc., v. Windsor, 521 U.S. 591, 617 (1997) (citation omitted); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156,

161 (1974) ("A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. . . . most of the plaintiffs [with small claims] would have no realistic day in court if a class action were not available."); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Thus, efforts to foreclose the availability of class actions in cases arising under TILA should prompt great skepticism.[24]

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24. The availability of fee-shifting does not lessen the importance that this Court has attached to the pursuit of consumer cases as class actions. In *Eisen*, for example, the availability of fee-shifting under the Sherman Act, 15 U.S.C. § 15a, and the Exchange Act of 1934, 15 U.S.C. § 78i(e), did not alter this Court's assessment that class treatment was essential to the pursuit of claims that may be worth no more than $70 each. *See Eisen*, 417 U.S. at 159-61.

Nor are courts likely to award lodestar fees, which may be many multiples of the $15 of economic damages that are available to Ms. Randolph and others similarly situated, because broad, injunctive relief is not likely to be awarded in these individual TILA claims against Green Tree. *See City of Riverside v. Rivera*, 477 U.S. 561, 574-76 (1986) (awarding attorneys' fees seven times the damages in a civil rights case because of the broad public importance of the non-monetary relief obtained); *Thomas v. County of Los Angeles*, 978 F. 2d 504, 510 (9th Cir. 1992) (reversing overly broad injunction because relief "should be tailored to fit within the scope of the litigation"); *Servisco v. Morreale*, 312 F. Supp. 103, 107 (E.D. La. 1970) (holding that "an injunction should conform to the requirements of the case").

2. Congress Attached Great Importance To The Availability Of Class Actions In The Enforcement Of The Truth In Lending Act.

Congress expected consumers to enforce TILA as "private attorneys general." *See McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978) ("The scheme of the statute is to create a system of private attorneys general to aid its enforcement. . . ."); *Johnson v. Tele Cash, Inc.*, 82 F. Supp. 2d 264, 275 (D. Del. 1999) ("[A]s countless circuit courts have noted, TILA is a prophylactic measure that creates a system of 'private attorneys general' to aid its enforcement.") (citation omitted).

Congress regarded the potential for class-wide liability as necessary to prompt lenders to comply voluntarily with the statute. By foreclosing the availability of class actions to consumers who invoke TILA, Green Tree's arbitration agreement frustrates the Congressional scheme for enforcing TILA. *See Watkins v. Simmons & Clark*, 618 F.2d 398, 402 (6th Cir. 1980); *Johnson*, 82 F. Supp. 2d at 269; *Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1120 (D. Haw. 1976).

The legislative history also makes this clear. In the 1974 amendments to TILA, for example, Congress set a limit on non-economic damages that may be awarded in class actions. The cap was needed to reassure some courts, previously reluctant to certify classes under TILA out of fear that aggregate damages awardable could destroy banks, and other lenders, that they could resume certifying class actions under the statute. S. Rep. No. 93-278, at 14-15 (1973). These amendments were enacted, therefore, to remove economic deterrents to the certification of TILA class actions. *Id.* In explaining the purpose of the 1974 Amendments, the Senate Committee on Banking, Housing and Urban Affairs confirmed the importance that Congress attached to class actions in the enforcement of TILA:

> [T]he Committee agrees with the Federal Reserve Board that "potential class action liability is an important encouragement to the voluntary compliance which is so necessary to insure nationwide adherence to uniform disclosure". . . .

See id. (emphasis added); *see also Watkins*, 618 F.2d at 400. The report of the Federal Reserve Board, upon which the Committee relied in its enactment of the 1974 amendments to TILA, elaborated on the reason it attached such importance to the enforcement of TILA through class actions:

> [A]ny inquiry into the justification for class actions should . . . [include] the prophylactic effect of the threat of class action exposure. That threat elevates a possible Truth in Lending lawsuit from the ineffective "nuisance" category to the type of suit which has enough sting in it to insure that management will strive with diligence to achieve compliance.

S. Rep. 93-278, at 36-37 (1973); *see also* 1972 Board of Governors of the Fed. Reserve Sys. Ann. Rep. to Congress on Truth in Lending 13-14.[25]

In 1976, Congress again emphasized the importance of class actions to the private enforcement of TILA, by increasing the maximum cap for class action recovery from $100,000 to $500,000. In enacting the 1976 amendments, Congress explained:

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25. Green Tree's citation to TILA cases brought by individuals in an effort to dispel the importance of class actions in the TILA enforcement scheme is of no consequence. Pet. Br. at 46-47 & n.13. As the legislative history reflects, it is the potential for class-wide liability, not the number of class actions brought, which is critical to ensuring voluntary compliance with TILA by banks like Green Tree. *See supra* Part II.B.2. The fact that several TILA cases brought by individuals were before this Court, therefore, is irrelevant in assessing the importance that Congress placed on class actions in enforcing the statute.

> The setting of any ceiling on class action liability is meant to limit the exposure of creditors to vast judgments whose size would depend on the number of members who happened to fall within the class. *The risk of any ceiling on class action recoveries is that, if it is too low, it acts as a positive disincentive to the bringing of such actions and thus frustrates the enforcement policy for which class actions are recognized.* Under the present Truth in Lending Act, where the class action ceiling is $100,000, several courts have noted the *incompatibility of that ceiling with the effective use of the class action device. The Committee wishes to avoid any implication that the ceiling on class action recovery is meant to discourage use of the class action device.*

S. Rep. No. 94-590 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431, 438 (hereinafter "Senate Report 94-590") (emphasis added) (citations omitted).

It is clear from the legislative history that Congress believed that the availability of class action liability was critical to securing compliance with the TILA.[26] Of course, Congress did not direct the district courts to grant class certification whenever requested by consumers. To do so would have thwarted the rigorous analysis required by Rule 23, Fed. R. Civ. P. in determining whether class certification is warranted by the facts of each case. *See General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

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26. Green Tree contends that the concurrent jurisdiction of federal and state courts to entertain TILA and ECOA claims evidences a recognition by Congress that these statutes may be enforced without the benefit of federal civil procedures like class actions. *See* Pet. Br. 34-35. Since most states have class action procedures, including Alabama, Green Tree's reasoning lacks force here. It was the availability of class actions to enforce these statutes, not the source of the class procedures, that concerned Congress. *See* Ala. St. R. Civ. P. 23.

But the intention of Congress was clear. Not once, but twice, Congress expressly stated its support for the availability of class actions to ensure the proper enforcement of TILA.[27]

3. By Foreclosing The Pursuit Of Class Actions Under TILA, Green Tree's Arbitration Agreement Works A Prospective Waiver Of The Rights Of Members Of The Putative Class.

By precluding Ms. Randolph and members of the putative class she represented from prosecuting their TILA claims through a class action, Green Tree has deprived them of a primary means contemplated by Congress for exercising their rights under the statute.[28] Because the members of the

27. Green Tree's blithe assertion that the temporary, six-month moratorium on class actions enacted in 1995 for a small group of TILA claims unlike those pursued by Ms. Randolph, demonstrates Congressional hostility to class actions does not withstand scrutiny. As the Chairman of the Senate Banking Committee at the time said: "This moratorium is narrowly focused on a specific, technical disclosure problems [sic], and will last only until October 1, 1995." *See* 141 Cong. Rec. S5614-02 (daily ed. Apr. 24, 1995) (statement of Sen. D'Amato); *see also id.* ("bill is narrowly drawn" and "intended as a temporary measure to deal with an urgent situation") (statements of Sen. Mack and Sen. D'Amato); *see also* 141 Cong. Rec. H4120-04 (daily ed. Apr. 4, 1995) (statement of Rep. Roukema). If anything, the temporary moratorium and following amendment illustrate that where Congress perceived a risk of abuse of the class action device, it will take prompt action, as it did by enacting the 1995 amendments. Had Congress disfavored the use of class actions to enforce TILA, as Green Tree suggests, it could have restricted the availability of class actions or the relief available from them. Leaving its earlier enactments intact reflects the continuing support of Congress for ensuring class actions are available to enforce TILA.

28. While Green Tree's arbitration agreement is silent on the issue of whether consumers may seek class wide relief through arbitration, Green Tree's strenuous opposition to class certification before the district court, *see* J.A. 13 (Br. in Supp. of Mot. to Compel Arb. at 50-55, Docket No. 50), eliminates any uncertainty that when it drafted the arbitration agreement without reference to class actions, it intended to deny the use of class actions to consumers by referring the cases individually to arbitration.

putative class have suffered modest economic damages, as the $15 value of Ms. Randolph's claim reflects, Green Tree's success in foreclosing access to class treatment would likely leave them with no other means to protect their statutory rights.[29] *See Eisen* 417 U.S. at 159-61; *Phillips Petroleum*, 472 U.S. at 809. Given the limited economic damages at issue individually, other consumers aggrieved by the mortgage agreement would be unlikely to invoke their rights under TILA, absent the ability to aggregate their claims and proceed on a class wide basis. Even the district court below seemed to recognize that, divested of the chance to prosecute their claims collectively, Ms. Randolph and the other consumers affected by Green Tree's practices were less likely to secure compliance with TILA. *See* Pet. App. 38a. By depriving Ms. Randolph and the members of the putative class she represented of the only viable means of prosecuting their claims under TILA and ECOA, arbitration is no longer "just another forum." *Mitsubishi Motors*, 473 U.S. at 628. Instead, it constitutes an impermissible bar to the ability of consumers to seek substantive remedies under TILA.[30]

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29. This action was originally brought on behalf of Ms. Randolph and other similarly situated mortgagees and the appeal was noticed as such. Therefore, the interests of the absent class members are properly before this Court.

30. Nor can there be any question that Ms. Randolph did not affirmatively waive her right to bring a class action by agreeing to arbitrate her claims. Because Green Tree's agreement was totally silent about whether Ms. Randolph could prosecute her claims collectively, she lacked any notice that she would be waiving this option. *See* Restatement (Second) of Contracts § 84 cmt. b (1981) (a waiver is a knowing relinquishment of a right about which a consumer knows or has reason to know).

4. This Court's Decision In *Gilmer v. Interstate/Johnson Lane Corporation* Does Not Permit Arbitration Agreements To Work A Wholesale Waiver Of Class Actions.

There is nothing in *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991), which endorsed the ban on class actions that Green Tree's arbitration agreement accomplished. This Court simply held that claims arising under the Age Discrimination in Employment Act ("ADEA") are susceptible to arbitration. *Id.* at 23. The plaintiff in *Gilmer* had asserted many grounds for exempting ADEA claims from arbitration. *Id.* at 30. Among them, he faulted the arbitration agreement for failing to permit him to proceed collectively on behalf of himself and others similarly situated. *Id.* at 32. Unlike this case, however, which was brought as a class action, *Gilmer* involved only an individual action.[31] *Id.* at 23. Thus, the plaintiff in *Gilmer* had relied on the mere possibility that he might expand his case to a collective action as a basis to foreclose arbitration. *Id.* at 32. Not surprisingly, this Court observed that "'if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" *Id.* (quoting *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)). Thus, persons with individual statutory claims may not exempt them from arbitration simply because the statute they have invoked contemplates the possibility of class treatment. The Court had no occasion, therefore, to consider whether a consumer who brought a class action, under a statute which Congress expressly contemplated be enforced

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31. In enforcing an agreement that foreclosed the ability to proceed collectively, this Court was reassured that the New York Stock Exchange rules expressly provided for collective proceedings. *See Gilmer,* 500 U.S. at 32.

through class actions, can be denied the chance to proceed on behalf of a class simply because she agreed to submit her claim to arbitration.

Moreover, *Gilmer*'s reliance on *Nicholson* confirms this interpretation of the decision. *Gilmer*, 500 U.S. at 32 (citing *Nicholson*, 877 F.2d at 241 (Becker, J., dissenting)). In *Nicholson*, a majority of the Third Circuit ruled that ADEA claims were exempt from arbitration. To reach this conclusion, the majority relied in part on the conclusion that the potential for collective actions reflected a Congressional intention to exclude individual ADEA claims from arbitration. *Nicholson*, 877 F.2d at 228-29. In dissenting from this view, Judge Becker began by opining that "arbitrations may in fact go forward as class actions." *Id.* at 240. Surely, *Gilmer* would not have relied expressly upon Judge Becker's dissenting opinion if it intended to permit arbitration agreements to foreclose the pursuit of class actions altogether.

5. The Federal Policies Underlying The FAA And TILA Can And Should Be Reconciled To Protect The Private Enforcement Of TILA Within An Arbitral Forum.

The importance that Congress attached to the availability of class actions in the private enforcement of TILA can be, and should be, reconciled with the federal policy giving due regard to the enforcement of freely negotiated agreements to arbitrate. Each statute should be given its full effect. If special care is taken to protect the due process rights of absent class members, then TILA class actions may be appropriate for arbitration. *See Keating v. Superior Court, Alameda County*, 167 Cal. Rptr. 481, 492 (Cal. Ct. App. 1980) ("there is no insurmountable obstacle to conducting an arbitration on a class-wide basis"), *superseded*, 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds, Southland v. Keating*, 465 U.S. 1 (1984); *see also Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 867 (Pa. Super. 1991); *Blue Cross of*

California v. Superior Court, 78 Cal. Rptr. 2d 779, 781 (Cal. Ct. App. 1998), *cert. denied*, 527 U.S. 103 (1999); *Gainey v. Occidental Land Research*, 231 Cal. Rptr. 249, 250-51 (Cal. Ct. App. 1986); *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 321-22 (Cal. Ct. App. 1986). The precise contours of such a scheme may be left to the district courts and the parties to develop and adapt to the particular demands of each class action.

Some courts, including the district court below, *see* Pet. App. 46a-48a, 53a-54a, will not permit class actions to proceed through arbitration absent an express provision for them. *See, e.g., Champ v. Siegal Trading Co.*, 55 F.3d 269, 274-77 (7th Cir. 1995) (holding that section 4 of FAA requires that the agreement be enforced as drafted, precluding class actions absent express provision for them); *Gammaro v. Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674-75 (D. Minn. 1993), *appeal dismissed*, 15 F.3d 93 (8th Cir. 1994); *Med. Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998). Other courts have declined to enforce arbitration agreements which would have foreclosed the availability of class actions under TILA and other consumer statutes. *See Johnson*, 82 F. Supp. 2d at 271 ("possibility of class action liability" critical to ensure voluntary compliance with TILA); *Lozada v. Dale Baker Oldsmobile*, 91 F. Supp. 2d 1087, 1104-05 (W.D. Mich. 2000); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 576 (Fla. Ct. App. 1999).

The better approach is to reconcile the interests of the FAA and TILA by permitting class actions to proceed to arbitration under rigorous procedural protections. Given the importance that Congress attached to the availability of class actions for the TILA enforcement scheme, arbitration agreements should not be enforced absent express provision for class actions.

CONCLUSION

The judgment of the court of appeals should be affirmed in its entirety.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTES

9 U.S.C. § 16
Appeals

(a) An appeal may be taken from —

(1) an order —

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order —

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Pub.L. 100-702, Title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4671, § 15; renumbered Pub.L. 101-650, Title III, § 325(a)(1), Dec. 1, 1990, Stat. 5120.)

* * *

28 U.S.C. § 1920
Taxation of Costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

(June 25, 1948, c. 646, 62 Stat. 955; Oct. 28, 1978, Pub.L. 95-539, § 7, 92 Stat. 2044.)

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